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UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

SETH D. HARRIS[1], Acting Secretary, United States Department of Labor,	))	Case No. EDCV12-1648-R (DTBx)
Plaintiff,	)))))	**SECRETARY'S OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**
v.	)	
GREATBANC TRUST COMPANY, et al.,	)))	Date: March 4, 2013 Time: 10:00 a.m. Hon. Manuel L. Real Ctrm. 8
Defendants.	))	

[1] This substitution is made pursuant to Fed. R. Civ. P. 25(d) following the resignation of Hilda L. Solis and the appointment of Seth D. Harris as the Acting Secretary of Labor.

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Seth D. Harris, Acting Secretary of the United States Department of Labor ("Secretary"), respectfully submits this Omnibus Opposition to Defendants GreatBanc Trust Co.'s ("GreatBanc"), the Sierra Aluminum Company's ("Sierra" or "the Company"), and the Sierra Aluminum Company Employee Stock Ownership Plan's ("ESOP") Motions to Dismiss Count II of the Secretary's Complaint (Dkt. Nos. 22 and 23) alleging violations of the Employee Retirement Income Security Act ("ERISA"). For the following reasons, Defendants' motions should be denied.

I. INTRODUCTION

Through their motions to dismiss, Defendants seek to preserve a provision that would require an ERISA plan to indemnify its own fiduciary that caused losses to the plan. Not only would Defendants' position undermine ERISA's remedial purposes, it is directly contrary to the plain language of the statute and the case law construing it, including decisions of this circuit.

Section 410(a) of ERISA broadly deems "void as against public policy" "any provision in an agreement or instrument that purports to relieve fiduciaries of ERISA plans from responsibility or liability for any responsibility, obligation, or duty" under Part 4 of ERISA, which establishes fiduciary standards. 29 U.S.C. § 1110(a). Since 1975, the Secretary has

interpreted § 410(a) "as rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan," 29 C.F.R. § 2509.75-4, an interpretation which is entitled to deference.

In moving to dismiss the Secretary's Second Claim for Relief, which alleges that the agreement obligating Sierra to indemnify GreatBanc violates § 410(a), no Defendant disputes that GreatBanc is a fiduciary of the ESOP. Nor do Defendants dispute that the ESOP, which owns 100% of Sierra's stock, will bear the burden of any indemnification paid by Sierra to GreatBanc under the terms of Defendants' indemnification agreement. Because that agreement would thus require the "indemnification of a fiduciary of an employee benefit plan by the plan," 29 C.F.R. § 2509.75-4, a fact none of the Defendants contests, it is void as against public policy under ERISA § 410(a). See 29 U.S.C. § 1110(a).

The Ninth Circuit has confirmed that a provision requiring an ESOP-owned company (like Sierra here) to indemnify the ESOP's fiduciary is void under § 410(a). In Johnson v. Couturier, 572 F.3d 1067 (9th Cir. 2009), the Ninth Circuit upheld an order barring an ESOP-owned company from advancing defense costs to the ESOP's fiduciary. As the court reasoned, given the ESOP's ownership interest in its sponsoring company, "advancement [of defense costs by the company] is here tantamount to asking

ESOP participants to pay for Defendants' defense costs," a result the court deemed incompatible with § 410(a). Id. at 1080. Just as in Couturier, because the ESOP here is Sierra's sole shareholder, any indemnification Sierra might pay to GreatBanc is "tantamount to asking ESOP participants to pay for [GreatBanc's] defense costs," in violation of § 410(a).

Defendants seek to evade Ninth Circuit precedent and the plain language of § 410(a) by grafting onto § 410(a) a limitation found nowhere in the statute's text. Defendants claim that an agreement requiring an ERISA plan to indemnify its own fiduciary violates § 410(a) only to the extent that it requires indemnification "in the event of a final, nonappealable judgment finding [the fiduciary] liable for a breach of fiduciary duty under ERISA." Sierra Aluminum's Mem. in Supp. of Mot. to Dismiss ("Sierra Mem.") at 9 (Dkt. No. 23-1); accord GreatBanc's Mem. in Supp. of Mot. to Dismiss ("GreatBanc Mem.") at 9 (Dkt. No. 22-1). For liability triggered by something short of a "final, nonappealable judgment" – such as where a case ends in settlement, as so many do – Defendants contend that ERISA plans can be made to indemnify their own fiduciaries without implicating § 410(a). Because the agreement here expressly precludes indemnification in the event of a final nonappealable judgment finding that GreatBanc breached its fiduciary duties, Defendants argue that the agreement does not offend §

410(a), regardless of whether it would require Sierra (and by extension, the ESOP) to indemnify GreatBanc if this case instead ends in settlement.

Defendants' narrow interpretation of § 410(a) is contrary to the statute's plain language and ERISA's remedial purposes. Section 410(a) nowhere contains a "final judgment" requirement, but rather broadly prohibits provisions that relieve fiduciaries of "responsibility or liability for any responsibility, obligation, or duty." 29 U.S.C. § 1110(a). If Defendants are correct that a payment made to settle a fiduciary breach claim somehow does not qualify as a "liability" within the meaning of § 410(a), then the ESOP effectively would have to give back to GreatBanc any settlement funds the Secretary recovers from GreatBanc for the ESOP's benefit. Such an illogical outcome is wholly incompatible with ERISA's purpose of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).

Even if § 410(a) somehow allows a plan to indemnify its fiduciary for payments made to settle a fiduciary breach claim, the indemnification provision here is still void. Under the provision, Sierra is permitted to advance to GreatBanc the defense costs it incurs in defending this lawsuit, subject only to an "arrangement[] reasonably satisfactory" to Sierra that it will be reimbursed should it be determined that GreatBanc is not entitled to

indemnification. But if that unspecified "arrangement" does not sufficiently ensure that Sierra (and, in turn, the ESOP, as Sierra's owner) can recover advanced defense fees from GreatBanc should this Court determine that GreatBanc breached its fiduciary duties, then the ESOP would be left indemnifying GreatBanc for an adjudicated fiduciary breach – a result that would plainly violate § 410(a), even under Defendants' conception of the statute. Because neither the Secretary nor this Court has yet had an opportunity to evaluate the adequacy of Sierra's reimbursement "arrangement" with GreatBanc, Defendants' motions to dismiss should be denied for this reason alone.

II. STATEMENT OF FACTS

The Secretary's Complaint comprises two claims for relief. In the First Claim for Relief – the central claim in this case – the Secretary alleges that GreatBanc, as the ESOP's trustee and fiduciary, breached its fiduciary duties of loyalty, prudence and adherence to plan documents, in violation of ERISA § 404(a)(1), 29 U.S.C § 1104(a)(1), and caused the ESOP to engage in prohibited transactions in violation of § 406(a), 29 U.S.C § 1106(a), by causing the ESOP to purchase Sierra stock from the Company's founders and primary shareholders for an amount far in excess of the stock's fair market value, and without adequately investigating the merits of the transaction.

Compl. ¶¶ 65-70. As GreatBanc notes, however, this claim is not at issue in its motion. GreatBanc's Mem. at 2.

What is at issue is the Secretary's Second Claim for Relief, which concerns the validity of the indemnification provision contained in an agreement between GreatBanc and Sierra. In 2005, Sierra entered into an engagement agreement with LaSalle Bank ("LaSalle") to act as the ESOP's trustee (the "Engagement Agreement"), Compl. ¶ 12; when GreatBanc succeeded LaSalle as the ESOP's trustee later that year, GreatBanc assumed LaSalle's rights and obligations under that agreement. See id. ¶ 13. One of those rights is embodied in Section 14 of the Engagement Agreement, labeled "Indemnification" (the "Indemnification Provision"). It provides as follows:

> 14. Indemnification. For purposes of this Section 14, the term "Indemnitees" shall mean LaSalle and its officers, directors, employees, and agents. Subject to the applicable provisions of ERISA, the Company shall indemnify the Indemnitees for any loss, cost, expense or other damage, including attorney's fees, suffered by any of the Indemnitees resulting from or incurred with respect to any legal proceedings related in any way to the performance of services by any one or more of the Indemnitees pursuant to this Agreement, the Plan or the Trust. The indemnification provided for in this Section 14 shall include, but not be limited to: (a) any action taken or not taken by any of the Indemnitees at the direction or request of the Company, any agent of the Company, or any committee or fiduciary under the Plan or Trust; and (b) all costs and expenses incurred by the Indemnitees in enforcing the indemnification provisions of this Section 14, including attorney's fees and court costs. However, these indemnification provisions shall not apply to the extent that any loss, cost, expense, or damage with respect to which any of the Indemnitees shall seek

> indemnification *is held by a court of competent jurisdiction, in a final judgment from which no appeal can be taken*, to have resulted either from the gross negligence or willful misconduct of one or more of the Indemnitees or from the violation or breach of any fiduciary duty imposed under ERISA on any one or more of the Indemnitees. An Indemnitee who receives an advancement of fees or expenses from the Company pursuant to this paragraph shall make arrangements reasonably satisfactory to the Company to ensure that such Indemnitee will reimburse the Company for such advancements in the event it is determined the Indemnitee is not entitled to retain such amounts hereunder.

Compl. ¶ 61 (emphasis added).

Thus, under the Indemnification Provision, Sierra is absolved from indemnifying GreatBanc for liabilities GreatBanc incurs as the ESOP's trustee only if it is "held by a court of competent jurisdiction, in a final judgment from which no appeal can be taken" that GreatBanc committed gross negligence, willful misconduct, or breached its fiduciary duties. Id. Absent a final judgment finding a fiduciary breach, gross negligence, or willful misconduct – such as where GreatBanc settles a fiduciary breach claim, no matter how meritorious the claim – Sierra must indemnify GreatBanc. Sierra also can advance to GreatBanc the fees and expenses of GreatBanc's defense counsel subject only to an "arrangement[] reasonably satisfactory to [Sierra]" ensuring that GreatBanc will return those fees to Sierra "in the event it is determined [that GreatBanc] is not entitled to retain such amounts hereunder." Id. Because the ESOP currently owns 100% of

Sierra Aluminum's stock, Compl. ¶ 10, any defense fees that Sierra advances to GreatBanc under the Indemnification Provision – and any indemnification Sierra ultimately pays to GreatBanc – would be borne by the ESOP. Id. ¶ 64.

III. STANDARD OF REVIEW

"A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint." L.A. Printex Indus., Inc. v. Global Gold, Inc., CV 08-7316 AHM JTLX, 2009 WL 453105, at *1 (C.D. Cal. Feb. 20, 2009). When evaluating a motion to dismiss under Rule 12(b)(6), the district court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. Moyo v. Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994). "Claims should be dismissed only when there is either a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" Shabani v. Classic Design Servs., Inc., 699 F. Supp. 2d 1138, 1141 (C.D. Cal. 2010) (quoting Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988)).

IV. ARGUMENT

A. By Requiring the ESOP to Indemnify Its Own Fiduciary, the Indemnification Provision Violates ERISA § 410(a) and the Department's Interpretive Regulation

As explained, ERISA § 410(a) prohibits "any provision in an agreement or instrument that purports to relieve a fiduciary from

responsibility or liability for any responsibility, obligation, or duty" imposed by ERISA's fiduciary provisions. 29 U.S.C. § 1110(a). The only form of fiduciary relief exempted from this otherwise broad prohibition is fiduciary liability insurance. See 29 U.S.C. § 1110(b). The statute makes no mention of indemnification agreements.

On June 4, 1975, the Department of Labor issued an interpretive bulletin announcing its interpretation of § 410(a) insofar as it relates to indemnification of fiduciaries. 29 C.F.R. § 2509.75–4. In that bulletin, the Department explained that "[i]ndemnification agreements which leave the fiduciary fully responsible and liable, but merely permit another party to satisfy any liability incurred by the fiduciary in the same manner as insurance . . . are not void under section 410(a)." Id. The Department made clear, however, that it "interprets section 410(a) as rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan." Id. As the Department explained, an arrangement that asks an ERISA plan to indemnify its own fiduciary does not "merely permit another party to satisfy the fiduciary's liability in the same manner as insurance." Id. To the contrary, it "would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of

fiduciary obligation." Id. Because Congress, in ERISA, charged the Department with administering Title I of ERISA (which encompasses § 410(a)) and issuing regulations interpreting it, see 29 U.S.C. § 1135, the Department's interpretive bulletin is entitled to "great deference." Lindow v. United States, 738 F.2d 1057, 1061 (9th Cir. 1984) (explaining that, in considering a Department of Labor interpretive bulletin, "[w]e show great deference to an administrative interpretation given by the agency charged with the statute's administration.").

Applying § 410(a) and the Department's interpretive regulation, the Ninth Circuit has previously held that a provision requiring an ESOP-owned company to advance defense costs to, and indemnify, the ESOP's fiduciary is void. In Johnson v. Couturier, 572 F.3d 1067 (9th Cir. 2009), the Ninth Circuit explained that the DOL's § 410(a) exemption for indemnification provisions that operate "in the same manner as insurance," 29 C.F.R. § 2509.75–4, "does not, however, extend to indemnification of a fiduciary by the ERISA plan itself." Couturier, 572 F.3d at 1080. The defendant fiduciaries "argued that section 410(a) does not apply because advancement [of defense costs] would be made from corporate, not plan, assets." Id. The Ninth Circuit rejected this as a distinction without a difference where an ESOP is concerned: "given that [the ESOP sponsor's] plan of liquidation

provides for payment of all remaining equity to ESOP participants as shareholders, this is not a case where, in accordance with 29 C.F.R. § 2509.75–4, the indemnification agreement 'merely permit[s] another party [other than the plan] to satisfy any liability incurred by the fiduciary.'" Couturier, 572 F.3d at 1080. Rather, "advancement [of defense costs by the company] is here tantamount to asking ESOP participants to pay for Defendants' defense costs," which the court deemed violative of § 410(a). Id.

Other cases have likewise invalidated provisions requiring ESOP-owned companies to indemnify the ESOP's fiduciary. Fernandez v. K-M Indus. Holding Co., Inc., 646 F. Supp. 2d 1150, 1155 (N.D. Cal. 2009) (deeming indemnification provision void under § 410(a) where "[t]he ESOP, which owns forty-two percent of KMH, would thus shoulder a large part of the burden of indemnification."); Donovan v. Cunningham, 541 F. Supp. 276, 289 (S.D. Tex. 1982) (explaining that, where "the ESOP owns a substantial portion of [the sponsor's] stock," it would be "inconsonant with the intentions of section 410 of ERISA . . . to permit indemnification by [the sponsor] where the ESOP would indirectly bear the financial burden.").

Just as in Couturier, Fernandez, and Cunningham, the Indemnification Provision here constitutes an "arrangement for indemnification of a fiduciary of an employee benefit plan by the plan" prohibited by § 410(a). 29 C.F.R. §

2509.75–4. While the Indemnification Provision nominally obligates Sierra, not the ESOP, to indemnify GreatBanc, Defendants concede that "[t]he ESOP acquired 100% of Sierra's shares," and is thus the Company's sole shareholder. Sierra's Mem. at 3. In effect, then, for a liability "incurred with respect to any legal proceedings related in any way" to GreatBanc's performance as the ESOP's trustee, save for the limited instance in which this Court issues a final nonappealable judgment of a fiduciary breach, willful misconduct, or gross negligence, Compl. ¶ 61, the ESOP is required to indemnify GreatBanc. Because the Indemnification Provision in this case effectively requires the ESOP to indemnify its own fiduciary (subject only to the limited exceptions noted above), it is void under ERISA § 410(a).

B. Defendants Are Incorrect that § 410(a) Prohibits a Plan from Indemnifying Its Fiduciary Only In the Event of a Final Judgment Finding a Fiduciary Breach

In urging this Court to dismiss the Second Claim for Relief, Defendants contend that the Indemnification Provision – by relieving Sierra from having to indemnify GreatBanc in the event of a final nonappealable judgment that GreatBanc breached its ERISA fiduciary duties, committed willful misconduct, or was grossly negligent – is fully compliant with § 410(a). For all other forms of liability, Defendants argue, a fiduciary may be indemnified by an ERISA plan without implicating § 410(a). Notably absent

from Defendants' motions, however, is any attempt to ground this cramped interpretation of § 410(a) in either the provision's text or ERISA's purposes. Moreover, the authorities on which Defendants rely are at best irrelevant and at worst supportive of the Secretary's position, while the lone case in Defendants' favor – an unpublished decision by a magistrate judge from another court – was wrongly decided.

1. Section 410(a)'s Language and Purpose Indicate that Settlement Payments Fall Within Its Ambit

The plain language of § 410(a) sweeps much wider than Defendants suggest. It broadly prohibits "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation or duty," 29 U.S.C. § 1110(a). Nowhere does the statute mention the need for a final judgment by a court finding a fiduciary breach.

Indeed, under its plain meaning, a "liability" does not depend on the existence of a court judgment. The "primary definition of liability" is "'[t]he quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.'" Herrera v. LCS Fin. Services Corp., C09-02843 TEH, 2009 WL 2912517, at *7 (N.D. Cal. Sept. 9, 2009) (quoting Black's Law

Dictionary 932 (8th ed. 2004)). A classic species of "liability" – i.e., of a "legal responsibility to another" – is one arising from a contract, such as a settlement agreement. Section 410(a), moreover, prohibits instruments relieving fiduciaries of liability "for any responsibility, obligation, or duty" under ERISA' fiduciary provisions, 29 U.S.C. § 1110(a) (emphasis added), a broad formulation that further belies any need for a court judgment finding a violation of an ERISA obligation or duty. Measured against the statute's expansive language, a payment made to settle an ERISA fiduciary breach claim qualifies as a "liability for" the fiduciary's duties under ERISA.

Even if it were somehow ambiguous whether § 410(a)'s plain language encompasses settlement-related liabilities, a number of other factors militate in favor of concluding that it does. First, as noted above, the Department has long interpreted § 410(a) as categorically "rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan." 29 C.F.R. § 2509.75–4. The Department did not in its interpretive rule delineate any exceptions, whether for settlement payments or otherwise. The Department's interpretations of ERISA embodied in interpretive rules are entitled to "great deference." Lindow, 738 F.2d at1061.

Exempting indemnification for payments made to settle fiduciary breach claims from the reach of § 410(a) also would create nonsensical

results. If § 410(a) demanded an adjudicated breach, then, under Defendants' logic, settling fiduciaries could obtain indemnification from their ERISA plans even if they openly admitted in their settlement agreements that they in fact breached their fiduciary duties. Congress could not possibly have intended such an absurd result. See United States v. Kimsey, 668 F.3d 691, 702 (9th Cir. 2012) (rejecting interpretation of statute that "would lead to absurd results.").

In addition, allowing settling fiduciaries to obtain indemnification from their ERISA plans would create a gaping loophole in § 410(a) that would run counter to ERISA's remedial purposes. In establishing the fiduciary standards set out in Part 4 of ERISA, which includes § 410(a), Congress sought "to protect . . . the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). But if § 410(a), as Defendants contend, permits ERISA plans to indemnify their fiduciaries for settlement payments, it would remove a huge swath of liabilities from § 410(a)'s reach. That is because the vast majority of cases – ERISA or otherwise – do not end with an adjudication on the merits, but instead end in settlement. See Theodore Eisenberg and Charlotte Lanvers, "What Is the Settlement Rate and Why Should We Care?", 6 J. of Empirical Legal Studies 111 (March 2009). Given the prevalence of settlements, to read into § 410(a) a settlement

loophole would hardly be protective of "the interests of participants in employee benefit plans." 29 U.S.C. § 1001(b). See Orange County Dept. of Educ. v. California Dept. of Educ., 668 F.3d 1052, 1059 (9th Cir. 2011) (rejecting interpretation of statute that is "not only improbable but also inconsistent with the purposes of [the statute]").

A "settlement loophole" in § 410(a) would also create a perverse incentive structure for ERISA fiduciaries accused of breaching their fiduciary duties. Armed with the knowledge that they can obtain indemnification from the plan in the event of settlement, but that they must foot their own bill if they are formally adjudged to have violated ERISA, fiduciaries will have an incentive to settle every case, no matter the settlement demand, rather than run the risk of an unfavorable judgment. This temptation to settle would be particularly strong where the case is a meritorious one involving an egregious breach of duty, which could well lead to a fiduciary breach finding. By settling such cases, fiduciaries would be assured that their ERISA plans will ultimately be left financially responsible, whereas if fiduciaries instead opted to litigate, they would run the risk of bearing their own liability. Because an indemnification provision containing such a "settlement loophole," like the one here, effectively allows fiduciaries to stick ERISA plans with the bill for every case alleging a fiduciary breach, no matter how meritorious the claim,

such a provision impermissibly "relieve[s] a fiduciary from . . . liability," in violation of § 410(a).

2. The Cases Defendants Rely Upon Are At Best Irrelevant and At Worst Supportive of the Secretary's Position

Finding the statutory language unhelpful to their contention that indemnification for settlement payments does not implicate § 410(a), Defendants instead attempt to seek refuge in case law. GreatBanc initially declares that there are "only two circumstances" in which courts have invalidated indemnification agreements under § 410(a): "First, courts have found indemnification agreements void if, by their terms, they provide for indemnification to fiduciaries for conduct ERISA prohibits"; and "[s]econd, indemnification is prohibited where the court has actually determined that the fiduciary breached its fiduciary responsibilities." GreatBanc Mem. at 8-9. GreatBanc then cites a smattering of cases fitting one or the other of these circumstances. See GreatBanc Mem. at 9 (citing Couturier, 572 F.3d at 1080), Fernandez, 646 F. Supp. 2d at 1156, and Delta Star, Inc. v. Patton, 76 F. Supp. 2d 617, 641 (W.D. Pa. 1999)). Because the Indemnification Provision here precludes indemnification in the event of an adjudicated fiduciary breach, unlike the agreements at issue in the cited cases, GreatBanc concludes that it does not violate § 410(a). GreatBanc Mem. at 10-11.

This is a classic red herring. Simply because courts have struck down indemnification agreements in the circumstances identified by GreatBanc does not mean that those are the only types of indemnification agreements that could possibly violate § 410(a). Indeed, in none of those cases did any court purport to make such a restrictive declaration. To be sure, if the Indemnification Provision here potentially allowed for indemnification in the event of an adjudicated fiduciary breach, as did the provisions in Couturier, Johnson, and Delta-Star, then that would be even further evidence of its illegality. But the fact that the Indemnification Provision contains an exclusion for adjudicated fiduciary breaches is not a panacea, particularly in light of its loophole for settlement payments, and none of the cases that GreatBanc cites in announcing its restrictive categories ever addressed the settlement-payment question.

If anything, the logic of those cases applies to indemnification for settlement payments no less than for adjudicated fiduciary breaches. In Couturier, for example, the Ninth Circuit held that the indemnification provision violated § 410(a) because it effectively required the ESOP to pay for their fiduciaries' defense costs "even if Defendants breached their fiduciary duties to the ESOP." 572 F.3d at 1080. And in striking down the indemnification provision at issue in Delta Star, the court there explained that

"ERISA prohibits, as being against public policy, any agreement that purports to relieve a fiduciary of responsibility or liability under ERISA for either breach of fiduciary duty or self-dealing." 76 F. Supp. 2d at 640. Thus, if an agreement could require an ERISA plan to indemnify a breaching fiduciary, it is void. Nowhere did any of these courts cabin this prohibition to "fiduciary breaches as found by a court in a final judgment," and certainly a fiduciary can breach its duties without a court's imprimatur. Because the Indemnification Provision here, through its settlement loophole, could well result in the ESOP indemnifying GreatBanc even if GreatBanc breached its fiduciary duties to the ESOP, it is invalid under the reasoning of Couturier and similar cases.

Contrary to Defendants' intimations, then, the weight of the case law is hardly on their side. Rather, as GreatBanc itself admits, "[its] research has found one court decision that has directly confronted the issue of whether a settlement in advance of a determination of liability for fiduciary breach raises concerns under Section 410(a) sufficient to deny indemnification." GreatBanc Mem. at 12 (emphasis added) (citing Martinez v. Barasch, 01-CIV-2289, 2006 WL 435727 (S.D.N.Y. Feb. 22, 2006)). While that decision, an unpublished one issued by a magistrate judge from another court, found

that § 410(a) did not prohibit a plan from indemnifying its fiduciaries for settlement payments, its reasoning is fundamentally flawed.

In Martinez, one of the plaintiffs was a trustee of an ERISA plan who sued his co-trustees for breaching their fiduciary duties to the plan. After the case settled, the defendants sought to recover attorneys' fees from the plan on the basis of a "clause in the pension plan's founding documents that obligates the plan to pay the costs of any suit against the trustees, provided payment is permissible under ERISA." Martinez, 2006 WL 435727, at *3. The plaintiff-trustee argued that ERISA prohibited the plan from indemnifying the defendant trustees, though he did not invoke § 410(a). Addressing § 410(a) *sua sponte*, the magistrate judge recognized that "[e]stablishing a rule that permits settling defendants to enforce their contractual indemnification rights poses a risk that in some cases fiduciaries will recoup expenses from the very plan they injured." Id. at *4 (internal quotations omitted). Nevertheless, the court reasoned that "[a] rule prohibiting the defendant from indemnification whenever a settlement is reached would unjustly relieve the plaintiff of its full burden." Martinez, 2006 WL 435727, at *4. As the court saw it, the plaintiff-trustee knew, or should have known, of the plan's indemnification obligation; if he wanted to prevent the plan from

indemnifying defendants, he was free to "insist[] on a reallocation of attorneys' fees as part of the settlement" or proceed to trial. Id.

The Martinez court's burden-shifting concerns are entirely irrelevant. Section 410(a) has nothing to do with the burden of proof on a plaintiff's substantive claim for relief; it simply limits a fiduciary's ability to receive reimbursement or other relief for its liabilities. Through § 410(a), Congress has struck a balance between the general policy in favor of permitting indemnification of corporate officers and directors, and ERISA's overriding objective of holding fiduciaries personally responsible for their misconduct. Any ancillary burden-shifting effect that § 410(a) might have is irrelevant.

Even if the burden proof were relevant to § 410(a), the magistrate judge's concerns are unfounded. The magistrate judge in Martinez reasoned that because a plaintiff in an ERISA case simply can "insist[] on a reallocation of attorneys' fees as part of the settlement," there need not be a categorical bar to ERISA plans indemnifying their fiduciaries for settlement payments. Martinez, 2006 WL 435727, at *4. But while trustee-plaintiffs (like the one in Martinez), who have their own fiduciary duties to the plan, might insist on such a condition, the same is not true of plaintiffs who are ERISA plan participants or beneficiaries. Unlike the trustee-plaintiff in Martinez, the typical participant-plaintiff – so long as they get their benefits –

does not care whether the plan, or anyone else, indemnifies the fiduciary, and thus has no incentive to "insist[] on a reallocation of attorneys' fees as part of the settlement." Martinez, 2006 WL 435727, at *4.

In any event, there currently exists a mechanism by which fiduciaries can obtain indemnification for settlement payments that fully complies with § 410(a) and assuages the burden-shifting concerns raised in Martinez. In Advisory Opinion No. 77-66, the Department responded to a joint opinion request by the named fiduciary and an investment adviser to a union pension fund regarding whether their indemnification arrangements with the fund violated § 410(a) to the extent those arrangements required the fund to pay indemnification for settlement payments. As the requesting indemnitees themselves recognized, if § 410(a) allowed ERISA plans to indemnify their fiduciaries for settlement payments, "it would create a giant loophole in ERISA section 410." Dep't. of Labor Advisory Opinion No. 77-66, 77-66A, 1977 WL 5446, at *11 (Sept. 9, 1977). The Department advised in response that "indemnification in settlement of pending or threatened litigation will not contravene the provisions of section 410(a) of ERISA if the Fund obtains a written opinion of independent legal counsel . . . that, based on a review of the relevant facts, the acts of the fiduciary in question do not constitute a breach of a fiduciary obligation by such fiduciary." Id. at *12.

This approach ensures that ERISA plans would not be left indemnifying a wrongdoing fiduciary for settlement payments, while at the same time allowing truly innocent fiduciaries to obtain indemnification. At this stage, there is absolutely no indication that GreatBanc has sought an evaluation of the Secretary's claims by an independent fiduciary, and of course, the Secretary would not have brought this case if the claims were not meritorious. In the absence of such a review by independent legal counsel, any indemnification paid by Sierra to GreatBanc for the latter's settlement of this case would violate § 410(a).[2]

C. The Indemnification Provision Also Violates § 410(a) Because It Permits Sierra to Advance GreatBanc Its Defense Fees Without An Adequate Recovery Guarantee

Even if § 410(a) were triggered only by an adjudicated fiduciary breach, the Indemnification Provision here is still void. That is because it permits Sierra (and, in effect, the ESOP) to advance GreatBanc its defense

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[2] GreatBanc also contends that the Court need not strike down the Indemnification Provision because "the Secretary is free to condition her consent to any settlement of this case on any terms she thinks appropriate." GreatBanc Mem. at 13. But "the validity of an indemnification agreement under ERISA must be determined from the face of the agreement." Fernandez, 646 F. Supp. 2d at 1157. Because the Indemnification Provision is facially invalid, it is void under § 410(a) regardless of the Secretary's ability to suppress its effect in a settlement agreement.

fees without adequate assurance that Sierra (and the ESOP) can recover those fees should this Court determine that GreatBanc in fact breached its fiduciary duties. Without an adequate reimbursement guarantee, the ESOP could well be left indemnifying GreatBanc for an adjudicated fiduciary breach, a result that even Defendants would concede violates § 410(a).

Under the Indemnification Provision, Sierra is permitted to advance to GreatBanc the defense costs it incurs in defending this lawsuit, subject only to an "arrangement[] reasonably satisfactory" to Sierra that it get reimbursed should it be determined that GreatBanc "is not entitled to retain such amounts hereunder" – that is, if this Court determines in a final nonappealable judgment that GreatBanc breached its ERISA fiduciary duties, committed willful misconduct, or was grossly negligent. Compl. ¶ 61. At this stage, of course, it is entirely unclear what this unspecified "arrangement" entails, to the extent one even exists. But what is clear is that this "arrangement" does not, on its face, require GreatBanc to demonstrate its ability to repay the fees plus interest in the event of an adjudicated fiduciary breach or purport to vest Sierra with any type of security interest. Absent proof of GreatBanc's ability to repay Sierra in the event this Court finds GreatBanc to have breached its fiduciary duties and a mechanism offering Sierra recourse if GreatBanc cannot in fact repay, the advancement of defense fees could leave the ESOP

indemnifying GreatBanc for an adjudicated fiduciary breach, in blatant violation of § 410(a). See Couturier, 572 F.3d at 1081 (upholding order enjoining agreement requiring advancement of defense costs in part because "there is a likelihood that Defendants will not have the resources to reimburse [the ESOP-owned company] if defense costs are advanced").

Until this Court has an opportunity to evaluate the adequacy of GreatBanc's reimbursement arrangement with Sierra, any resolution of the Second Claim for Relief is premature.

V. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss should be denied.

Dated: February 11, 2013

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Secretary's Omnibus Opposition to Defendants' Motions to Dismiss in the above-captioned case was served on counsel of record via the court's ECF system.

/s/ *Jeffrey Hahn*
JEFFREY HAHN